

THIRD DIVISION
MARCH 31, 2014

No. 1-12-0993

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

)	Appeal from the
)	Circuit Court of
DOROTHY CAPUA,)	Cook County.
)	
Petitioner-Appellee,)	
)	No. 93 D 221
v.)	
)	
ROBERT CAPUA,)	The Honorable
)	Mark Joseph Lopez,
Respondent-Appellant.)	Judge Presiding.
)	

JUSTICE PUCINSKI delivered the judgment of the court
Justices Neville and Mason concurred in the judgment.

ORDER

- ¶ 1 *HELD:* Order of the circuit court granting petitioner's motion to dismiss respondent's jurisdictional challenge reversed where it concluded respondent's failure to comply with section 2-301 of the Illinois Code of Civil Procedure (735 ILCS 5/2-301 (West 2010)) constituted a prospective and retroactive waiver of all of his objections to the court's jurisdiction. Pursuant to the Illinois Supreme Court's recent decision in *BAC Home Loans Servicing LP v. Mitchell*, 2014 IL 116311, waivers governed by section 2-301 operate prospectively only.
- ¶ 2 Respondent Robert Capua appeals an order of the circuit court granting petitioner

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Dorothy Capua's motion to dismiss his petition to vacate an earlier judgment for lack of jurisdiction pursuant to section 2-301 of the Illinois Code of Civil Procedure (Code or Code of Civil Procedure) (735 ILCS 5/2-301 (West 2010)). On appeal, respondent argues that the court's interpretation and application of that provision is "contrary to Illinois law." For the reasons explained herein, we reverse the judgment of the circuit court and remand for further proceedings.

¶ 3

I. BACKGROUND

¶ 4 On February 27, 1998, the circuit court entered a judgment dissolving the marriage between petitioner and respondent. Pursuant to the terms of the judgment, respondent was required to pay maintenance to petitioner for a limited period of time after the entry of the divorce decree. Thereafter, on April 15, 2004, the circuit court entered a domestic relations contempt order against respondent, finding that he was in arrears of his payment obligations in the amount of \$92,193. Following the contempt order, the parties filed various pleadings and made appearances before the circuit court. In pertinent part, petitioner filed several citations to discover assets in 2010 and respondent filed responsive pleadings including a motion to strike petitioner's citations as well as a supplement thereto. When his motions to strike were denied, respondent then participated in the evidentiary hearing held by the circuit court to rule on the merit of petitioner's citations. At no time did respondent raise any objections to the court's personal jurisdiction over him when the 2004 original contempt order was entered.

¶ 5 On October 12, 2010, however, respondent filed a petition to vacate the court's 2004 contempt order pursuant to section 2-1401 of the Illinois Code of Civil Procedure (735 ILCS 5/2-

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1401 (West 2010)), citing lack of personal jurisdiction. In his memorandum of law submitted in support of his motion, respondent argued:

"The court file, as well as the court case information summary is devoid of any documentation which would reflect service * * * . Proper service is a prerequisite to obtaining jurisdiction over a party and if Respondent has not been properly served, any order the court enters against him is void, whether or not he had actual notice of the proceedings. The April 15, 2004 Judgment is void and should be vacated as proper service of the pleadings and rule are a prerequisite to obtaining jurisdiction over a party."

¶ 6 Petitioner, in turn, responded with a motion to dismiss respondent's 2-1401 petition. In it, petitioner argued that "Robert's argument is fundamentally flawed as Robert, through his actions, has submitted to the jurisdiction of this Court and has waived any objections with regard to jurisdiction and/or sufficiency of process." Citing the plain language section 2-301 of the Illinois Code of Civil Procedure, petitioner argued that respondent waived his objection regarding the insufficiency of service and lack of personal jurisdiction when he "filed numerous motions and responses [and] participated in an evidentiary hearing adjudicating one of the pleadings before this Court on its merits * * * before raising the issue of service."

¶ 7 Following a hearing, the circuit court granted petitioner's motion to dismiss respondent's section 2-1401 petition. The rationale for the court's ruling was that respondent waived his right to challenge the court's personal jurisdiction in 2004 by participating in proceedings after that date without first raising his jurisdictional challenge as required by section 2-301 of the Code (735 ILCS 5/2-301 (West 2010)). In its detailed written order, the court explained, in pertinent

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part, as follows:

"The record shows that after [counsel] filed his general appearance for Robert, the first motion or pleading filed by Robert was his Motion to Strike Dorothy's Citations, and then he filed a Supplement to his Motion to Strike. Robert then engaged in an evidentiary hearing seeking relief of striking Dorothy's citation proceedings. * * * All of these pleadings by Robert preceded his contesting the court's personal jurisdiction over him when the April 15, 2004 order was entered. The first [several] pleadings filed by Robert post[-]appearance never raised the issue of the Court's purported lack of personal jurisdiction over him when the Court originally entered the judgment against him on April 15, 2004.

* * *

Pursuant to the plain language of 735 ILCS 5/2-301(a), after the litigant has filed their general appearance, the second step requires the litigant to file a pleading or a motion contesting the court's jurisdiction over the party's person, either on the grounds that the party is not amenable to process of a court of the state or on the grounds of insufficiency of process or insufficiency of service of process by filing a motion to dismiss the entire proceedings or any cause of action involved in the proceeding or by filing a motion to quash service of process.

The clear and unambiguous language of paragraph (a) mandates that a litigant must attack jurisdiction in the first pleading or motion they file after their general appearance. Paragraph [(a-5)] provides actual notice to the litigant that failure to do so

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waives all objections to the Court's jurisdiction over the [party's] person.

This Court finds that nothing contained in the plain language of paragraph [(a-5)] restricts or limits the waiver to prospective only.

* * *

If the litigant has failed to comply with the clear and unambiguous statutory language provided by Section 2-301 they have waived all objections to the court's jurisdiction over the [party's] person, not because the filing of a general appearance serves as a retroactive waiver, not because the failure to raise the jurisdictional issue serves to validate a judgment after the fact but rather the pleadings or motions filed with the Court seeking relief on issues other than jurisdiction serves as that party voluntarily submitting themselves to the Court's jurisdiction and acknowledging the Court's jurisdiction over the party and the subject matter.

* * *

The record shows that Robert filed two motions and a responsive pleading, sought relief from the Court in quashing citation proceedings and engaged in an evidentiary hearing to conclusion and filed a motion to substitute attorneys, all prior to filing a motion in compliance with 735 ILCS 5/2-301(a).

The Court finds that Robert failed to comply with the statutory directives of 735 ILCS 5/2-301(a) by filing other pleadings and motions and engaging in evidentiary hearings, prior to filing any motion to contest jurisdiction. The Court finds that pursuant to the plain language of Section [(a-5)] Robert 'waives all objections to the Court's

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jurisdiction over the [party's] person.' "

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 On appeal, respondent argues that the circuit court's interpretation and application of the jurisdiction provision set forth in section 2-301 of the Illinois Code of Civil Procedure failed to accord with well-established case law, which provides that orders or judgments entered in the absence of jurisdiction are void *ab initio*, and that even if a party later submits to jurisdiction, he only does so prospectively. That is, a party's subsequent appearance or participation in judicial proceedings does not serve to retroactively validate orders that were entered previously in the absence of personal jurisdiction. The Chicago Legal Clinic filed an *amicus curiae* brief in support of respondent's position.

¶ 11 This appeal involves the interpretation and application of a statute, which is an issue of law subject to *de novo* review. *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 16. When interpreting a statute, the primary objective is to give effect to the legislature's intent, which is best determined by looking to the plain language of the statute itself. *Hartney*, 2013 IL 115130, ¶ 16; *Dumke v. City of Chicago*, 2013 IL App (1st) 121668, ¶ 19. When the legislature elects to amend a statute after judicial opinions interpreting the statute have been published, we presume that the legislature acted with knowledge of the prevailing case law. *Hartney*, 2013 IL 115130, ¶ 16. The issue of a court's jurisdiction over a party is also an issue of law that is subject to *de novo* review. *In re Estate of Burmeister*, 2013 IL App (1st) 121776, ¶ 27.

¶ 12 Section 2-301 of the Illinois Code of Civil Procedure governs objections to personal

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jurisdiction. 735 ILCS 5/2-301 (West 2010). Prior to 2000, a party seeking to challenge personal jurisdiction was required to file a special and limited appearance expressly for that purpose. 735 ILCS 5/2-301 (West 1998); *C.T.A.S.S.&U. Federal Credit Union v. Johnson*, 383 Ill. App. 3d 909, 911 (2008). Failure to do so resulted in a general appearance (735 ILCS 5/2-301 (West 1998)), which was held to waive the party's objections to personal jurisdiction and subject the party to authority of the court. *KASC Corp. v. Recycle Free, Inc.*, 364 Ill. App. 3d 593, 594 (2006). Waiver, however, only applied prospectively. That is, a party's appearance did not operate to retroactively validate orders entered in the absence of jurisdiction prior to the appearance. See *In re Marriage of Verdung*, 126 Ill. 2d 542, 547 (1989) (finding that a general appearance made in a collateral proceeding attacking an earlier judgment did not confer personal jurisdiction retroactively).

¶ 13 Section 2-301 was amended in 2000 to eliminate the distinction between special and general appearances. P.A. 91-145, § 10, eff. Jan. 1, 2000. It currently provides as follows:

"§ 2-301. Objections to jurisdiction over the person.

(a) Prior to the filing of any other pleading or motion other than a motion for an extension of time to answer or otherwise appear, a party may object to the court's jurisdiction over the party's person, either on the ground that the party is not amenable to process of a court of this State or on the ground of insufficiency of process or insufficiency of service of process, by filing a motion to dismiss the entire proceeding, or any cause of action involved in the proceeding or by filing a motion to quash service of process. Such a motion may be made singly or included with others in a combined motion, but the parts

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of the combined motion must be identified in the manner described in Section 2-619.1.

Unless the facts that constitute the basis for the objection are apparent from papers already on file in the case, the motion must be supported by an affidavit setting forth those facts.

(a-5) If the objecting party files a responsive pleading or a motion (other than a motion for an extension of time to answer or otherwise appear) prior to the filing of a motion in compliance with subsection (a), that party *waives all objections* to the court's jurisdiction over the party's person." (Emphasis added.) 735 ILCS 5/2-301 (a), (a-5) (West 2010).

Thus, in its current form, a party raising a jurisdictional challenge under section 2-301 need not file a separate motion before any other responsive pleading to do so; rather, the objection to personal jurisdiction may be included in a motion that seeks other forms of relief. *KSAC Corp.*, 364 Ill. App. 3d at 595.

¶ 14 On several occasions, courts have examined the effect of the 2000 amendment on the temporal scope of waivers of personal jurisdiction and have come to different conclusions. Compare *C.T.A.S.S.&U. Federal Credit Union v. Johnson*, 383 Ill. App. 3d 909, 911 (2008) (rejecting the argument that amended section 2-301 could be applied to allow for retroactive waivers, reasoning: "Section 2-301 has never been applied in a postjudgment proceeding to give a trial court retroactive jurisdiction or to validate orders entered without jurisdiction. Nor is there indication that the legislature intended to achieve this result when it amended section 2-301"); with *GMB Financial Group, Inc., v. Marzano*, 385 Ill. App. 3d 978, 997 (2008) (finding that based on the plain language of amended section 2-301, there was "no temporal restriction on the

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waiver; [and that] it works prospectively and retroactively") and *Eastern Savings Bank, FSB, v. Flores*, 2012 IL App (1st) 112979, ¶ 16 (holding that "[w]hen a party waives objections to jurisdiction [under the amended version of section 2-301], it does so both prospectively and retroactively").

¶ 15 In *BAC Home Loans Servicing LP v. Mitchell*, 2014 IL 116311, however, our supreme court recently addressed and resolved the split in authority regarding the temporal scope of section 2-301's waivers of personal jurisdiction. After examining the plain language of the statute as well as the legislative history of the statutory provision and the 2000 amendment, the court concluded that "a party's waiver of personal jurisdiction is prospective only and does not serve to validate retroactively orders entered by the circuit court without jurisdiction." *Id.* at ¶ 1.

The court explained:

"[T]here is no indication from the legislative history that the amendment was intended to alter the existing law on the effect of waiver of objections to personal jurisdiction. The amendment to section 2-301 was intended to provide additional protection of a defendant's right to assert an objection to the court's personal jurisdiction by preventing unknowing waiver. If we were to construe the amended statute as providing for retroactive waiver validating prior orders entered without personal jurisdiction, it would result in a harsher rule on waiver and be inconsistent with the legislature's objective of providing parties additional protection in this context.

* * *

Based on the statutory language and legislative history, we do not believe the

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legislature intended to adopt a rule allowing a defendant's waiver to validate retroactively orders entered without personal jurisdiction. * * * In the absence of clear language or legislative history to the contrary, we conclude that section 2-301(a-5), as amended, codified the law on waiver as it existed before the amendment. We, therefore, reaffirm the longstanding rule that a 'party who submits to the court's jurisdiction does so only prospectively and the appearance does not retroactively orders entered prior to that date.' "

Id. at ¶¶ 42-43, *quoting In re Marriage of Yerdung*, 126 Ill. 2d 542, 547 (1989).

¶ 16 Here, in accordance with current prevailing authority, we hold that when respondent filed pleadings in response to petitioner's citations, that did not, at the same time, contain his jurisdictional challenge, he waived his objections to the circuit court's jurisdiction. *BAC Home Loans*, 2014 IL 116311, ¶ 44. His waiver, however, operated *prospectively* only and did not serve to retroactively validate any prior orders entered in the absence of personal jurisdiction. *Id.* Because a waiver under section 2-301 operates prospectively only, we must reverse the circuit court's order granting petitioner's motion to dismiss respondent's section 2-1401 (735 ILCS 5/2-1401 (West 2010)) petition that contained his jurisdictional challenge.

¶ 17

III. CONCLUSION

¶ 18 The judgment of the circuit court is reversed and the cause remanded for further proceedings.

¶ 19 Reversed and remanded.